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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

B. MIANECKI and THE STATE OF WISCONSIN,
Petitioners,

vs.

SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
THE HONORABLE JOHN E. GABRIELLI,
LINDA A. AVERETT and STANLEY E. AVERETT, individually;
and LINDA A. AVERETT, as mother and guardian of
TRENT AVERETT, a minor child,
Respondents.

ANSWERING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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TABLE OF CONTENTS

	Page
Note to list of parties	1
Argument in opposition to petition for a writ of certiorari	2
A. Considerations of "cooperative federalism" do not justify a restrictive construction of State of Nevada v. Hall in the context of the case at bar	3
B. The full faith and credit clause does not require Nevada, as a matter of constitutional mandate, or by reason of comity, to recognize Wisconsin's reserved sovereign immunity	8
Conclusion	14
Appendices:	
Appendix A (Order, November 9, 1982)	A-1
Appendix B (Order, December 8, 1982)	B-1

TABLE OF AUTHORITIES

Cases

	Page
Allstate Insurance Co. v. Hague, 449 U.S. 302, 66 L.Ed. 2d 521, 101 S.Ct. 633 (1981)	13
Daughtry v. Arlington County, Virginia, 490 F.Supp. 307 (D.D.C. 1980)	5, 7
Holytz v. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962)	12
Knox v. Regents, University of Wisconsin, 395 F. Supp. 886 (E.D. Wis. 1975)	12
Peterson v. Texas, 635 P.2d 241 (Colo. Ct. App. 1981)	5
State v. Silva, 86 Nev. 911, 478 P.2d 591 (1970)	11
State of Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979)	2, 3, 4, 7, 8, 11, 12, 14
Struebin v. State, 322 N.W.2d 84 (Iowa 1982)	6, 7
Townsend v. Wisconsin Desert Horse Assoc. et al., 72 Wis.2d 414, 167 N.W.2d 425 (1969)	12

Constitution

United States Constitution, Art. IV, Sec. 1	8

Statutes and Rules

United States Supreme Court Rules, Rule 17	4

Secondary Authorities

The Council of State Governments, Handbook For Interstate Crime Control, The Interstate Compact for the Supervision of Parolees and Probationers	10

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NOTE TO LIST OF PARTIES

The List of Parties on page ii of the Petition for a Writ of Certiorari correctly identifies the guardian of the minor child. Trent Averett, as "Linda A. Averett", but the caption of the case incorrectly identifies her as "Linda C. Averett". The Respondents, Second Judicial District Court of the State of Nevada and The Honorable John E.

Gabrielli are nominal parties, the real parties in interest being the Averetts. Counsel herein is counsel for the Respondent Averetts, but files this Answering Brief on behalf of all Respondents.

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Petitioners, The State of Wisconsin and B. Mianecki, an employee of Wisconsin charged with responsibility for the administration of the Interstate Compact for the Supervision of Parolees and Probationers for Wisconsin, have petitioned for a writ of certiorari to review the decision of the Nevada Supreme Court, set forth in Appendix B to the Petition, wherein the Nevada Supreme Court ruled that the courts of the State of Nevada were constitutionally entitled to provide a forum to the citizens of Nevada to recover damages for injuries suffered as a result of negligence of Wisconsin in the administration of the Interstate Compact for the Supervision of Parolees and Probationers.

This case involves an application of the prior decision of this Court in *State of Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) to a cause of action for negligence arising from the performance of duties and responsibilities undertaken pursuant to the Interstate Compact entered into by the states in their sovereign capacities and approved by Congress. The Petitioners contend that a decision by this Court on the scope of *State of Nevada v. Hall, supra*, is required because, unlike the automobile accident situation in *Hall*, this case involves the exercise of sovereign functions, which invokes considerations of "cooperative federalism" and the "Full Faith and Credit Cause" of the United States Constitution.

A. Considerations of "Cooperative Federalism" Do Not Justify a Restrictive Construction of State of Nevada v. Hall in the Context of the Case at Bar

The Petitioners' first contention in support of their Petition is premised upon the language of footnote 24 to this Court's opinion in *State of Nevada v. Hall*, 440 U.S. 410, 425, 99 S.Ct. 1182, 1191, 59 L.Ed.2d 416 (1979) wherein it is stated:

> "California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result."

Relying upon the above language in *State of Nevada v. Hall, supra*, the Petitioners contend that, inasmuch as this case involves action taken under and pursuant to an agreement made between two sovereign states, acting in their sovereign capacity, with regard to crime and corrections—a field uniquely of sovereign responsibility—the decision of the Nevada Supreme Court expressly contravenes the holding of *State of Nevada v. Hall, supra.* Petitioners contend that such decision should be overruled by this Court in order to preserve intact the spirit of "cooperative federalism" manifested by the sovereign states who are parties to the Interstate Compact.

To buttress this argument, Petitioners have attempted to introduce original evidence, not a part of the Record in the Nevada Supreme Court, by inclusion of four self-serving "opinion" affidavits as Appendices E, F, G and

H to their Petition. Petitioners' efforts to make these same affidavits a part of the Record in the Nevada Supreme Court was specifically and expressly rejected by the Nevada Supreme Court, by Order filed and entered November 9, 1982 (Appendix A to this Answering Brief), and then again when Petitioners tried to refile them in the guise of amicus curiae briefs. (Order, December 8, 1982, Appendix B to this Answering Brief). Review by certiorari is an exercise of appellate jurisdiction, and does not contemplate the introduction of original evidence not considered by the Court whose decision is under review. It is therefore respectfully submitted that such self-serving affidavits cannot properly be considered in support of the Petition.

It is respectfully submitted that the contentions of the Petitioners in support of their Petition for a Writ of Certiorari do not justify the intervention of this Court under the considerations governing the issuance of a Writ of Certiorari as set forth in Rule 17 of the United States Supreme Court Rules. The fundamental issue raised by the Petition is whether one sovereign state is constitutionally bound to recognize the reserved sovereign immunity of a sister state by denying access to its courts to its citizens who have suffered damages as a result of torts committed within such state by the sister state. That issue was resolved by this Court in *State of Nevada v. Hall, supra.* The state courts which have had occasion to interpret and apply the *Hall* decision have shown remarkable uniformity in their application of its principles, and have manifested no compelling need for further guidance from the United States Supreme Court at this time. Such state court decisions have uniformly recognized that the forum state is not constitutionally bound to recognize the reserved

sovereign immunity of a sister state when to do so would violate its own fundamental policies, whether the liabilities of the sister state are predicated upon tort or upon contracts entered into and performed as a sovereign, and whether or not the breach of duty arose from the performance of a governmental or sovereign function. The dire predictions of the collapse of the federal system which were made in each of such cases have not become a reality as the result of the willingness of the Courts to hold a sovereign accountable for its wrongdoing in a sister state.

In *Daughtry v. Arlington County, Virginia*, 490 F.Supp. 307 (D.D.C. 1980), the District of Columbia Court recognized that the exercise of sovereign functions in the area of crime and corrections did not compel recognition of the reserved sovereign immunity of Virginia. In so holding, the Court stated: [at 490 F.Supp. p. 315]

> "The Full Faith and Credit Clause of the Constitution does not require courts in the District of Columbia to recognize the sovereign immunity of Virginia. See *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 2d 416 (1979). The defendant's contention that the *Nevada* case is distinguishable from this suit because a judgment against Arlington County, Virginia, will interfere with the ability of the sovereign to fulfill its responsibilities is without merit. While the County is free to exercise its police power, it must compensate the victims of its wrongful conduct."

Similarly, in *Peterson v. Texas*, 635 P.2d 241 (Colo. Ct. App. 1981), the Colorado Court, in a case analogous to that at bar, involving supervision and control of persons involved in the corrections system, specifically a juvenile rehabilitation program administered by the State of Texas, recognized that Colorado citizens injured as a result of

negligent supervision of the juvenile offenders had a remedy in the Colorado courts, which were not bound to recognize the reserved sovereign immunity of Texas.

In a case specifically involving duties of a sovereign arising from an interstate contract entered into by the States of Iowa and Illinois in their sovereign capacities, the Iowa Court rejected the very same arguments made by the Petitioners herein. In *Struebin v. State,* 322 N.W.2d 84 (Iowa 1982), the State of Illinois was bound by contract with the State of Iowa to maintain the Interstate 80 bridge over the Mississippi River on the border of the two states. As a result of negligent maintenance, the decedents were killed when their vehicle plunged into the river, and a wrongful death action was brought against Illinois in the Iowa state court. Illinois' limited immunity waiver statute required pre-conditions to suit, and placed a ceiling of $100,000 on the state's liability. The Iowa Court, in rejecting Illinois' contention that such limitations on its waiver of immunity must be recognized, stated: [at 322 N.W.2d p. 86]

> "Illinois seeks to distinguish the present case from *Hall* by pointing out that its duty to maintain the Interstate 80 Bridge arose from a contract that it entered in its sovereign capacity in a spirit of cooperative federalism. It asserts that footnote 24 in *Hall* limits the holding to its unique facts, leaving intact an allegedly pre-existing constitutional bar to state court jurisdiction over sister states where liability is alleged based on the sister state's exercise of a governmental function. . . .
>
> "We see several flaws in Illinois' position. First, the *Hall* case enunciates for the first time an alternative general principle that the Constitution does not man-

> date interstate comity. It demonstrates that the prior contrary assumption was unwarranted. The case does not merely carve out an exception to a general principle of immunity. Second, the footnote points out that the *Hall* facts did not threaten Nevada's sovereign prerogatives and responsibilities. It does not necessarily limit the holding to the *Hall* facts. Finally, the footnote merely reserves the question of different analysis or result where different state policies are involved. It does not suggest that an exception must be made where, as here, a threat to interstate cooperation is asserted. We do not think that allowing Illinois to be sued in Iowa courts for torts committed in Iowa constitutes a substantial threat to our constitutional system of cooperative federalism."

With regard to the contention that allowing suit would threaten the interstate contractual relationship entered into in the spirit of "cooperative federalism", the Iowa Court, in *Struebin v. State, supra,* echoed the sentiments of the District of Columbia Court expressed in the quoted portion of *Daughtry v. Arlington County, Virginia, supra,* when it stated:

> "Illinois does not and could not claim a sovereign right to be negligent in carrying out its contractual responsibilities in maintaining the Interstate 80 Bridge. The fact that it accepted the responsibilities as a sovereign does not make them any less obligatory."

In concluding its opinion, the Iowa Court cited with approval the decisions of the other state courts which have construed the *Hall* decision, noting that all of the courts which have been called upon to construe that decision have been uniform in their application thereof to open the courts of the forum state to permit its citizens to seek relief against a

sister state under circumstances wherein the forum state would be subject to suit under its own policy, regardless of whether the duties giving rise to the claimed liability arose from contract and regardless of whether they involved the exercise of governmental functions. It is respectfully submitted that the decision of the Nevada Supreme Court in the case at bar is well within the perameters of the decisions of the other state courts, and does not present a unique situation of compelling sister state policies such as envisioned in footnote 24 of this Court's decision in *State of Nevada v. Hall, supra.* This case involves nothing more than an application of the principles of *Hall*, and does not require the creation of an exception thereto. Nothing in the assertion of jurisdiction by Nevada over Wisconsin in the context of this case threatens Wisconsin's ability to carry out its contractual obligations entered into as a sovereign, or the spirit of cooperative federalism in which such contract was entered into. In fact, the thrust of this action is to enforce such contractual obligations, not interfere with them. It is therefore respectfully submitted that there is nothing in the constitutional system of cooperative federalism which requires review of the Nevada Supreme Court's decision in the case at bar.

B. The Full Faith and Credit Clause Does Not Require Nevada, as a Matter of Constitutional Mandate, or by Reason of Comity, to Recognize Wisconsin's Reserved Sovereign Immunity

The Petitioner's second contention is that the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, mandates that Nevada recognize and honor Wisconsin's reservation of sovereign immunity

against the type of liability sought to be imposed in the case at bar.

The Petitioner's argument is premised upon the contention that Nevada's exercise of jurisdiction over Wisconsin in the context of this case serves nothing more than a parochial purpose of providing Nevada residents a remedy in Nevada courts. The Petitioners point out that since Nevada itself is a party to the Interstate Compact, its own policy supports the policy and purposes of the Compact, and the retention of immunity for discretionary functions, such as the decision to permit a probationer to transfer to another State. Thus, argues Petitioners, Nevada's limited interest in providing a forum to its own residents is insufficient to defeat or override Wisconsin's legitimate policy interest in fulfilling its sovereign responsibilities with regard to the administration of its criminal justice system.

It is respectfully submitted that in structuring this argument, the Petitioners have painted with too broad a brush. Nothing in this litigation threatens the performance of any State under the Interstate Compact, or implies any purpose to defeat the policies and purposes of the Interstate Compact. On the contrary, recognition of the liability sought to be imposed on Wisconsin in this case by the Nevada courts will enhance performance and further the policies and purposes of the Interstate Compact as both the Nevada Trial Court, Respondent herein, and the Nevada Supreme Court noted in their respective opinions. Enforcement of a cause of action arising for damages for negligent performance of contractually assumed responsibilities will not sound the death knell of the Interstate Compact anymore than the imposition of strict products liability sounded the

death knell of the manufacturing and distributing industries in the United States. It is not the utilization of the Compact provisions which will give rise to liability; it is the negligence in the carrying out of the duties and responsibilities which is the foundation of the remedy provided in the courts of the receiving state.

A review of what is actually at issue in this case immediately exposes the fallacy of the Petitioner's argument. Both the Respondent Trial Court and the Nevada Supreme Court were very careful to point out that this case does not involve a challenge to the Interstate Compact itself, or an attempt to subvert its policies and purposes. Nor does this case involve an attempt to impose liability for a decision to effect a transfer under the Compact. This case simply involves asserted liability for negligence on the part of the Petitioners in failing to comply with the provisions of the act regarding arrangements for supervision and control of a transferred probationer, and negligence in failing to warn and advise the persons in the receiving state of known propensities of the transferred person to commit acts of sexual assault on young male children, when the home to which the person was to be sent had therein young male children. Both the Respondent Trial Court and the Nevada Supreme Court quoted from The Council of State Government, Handbook for Interstate Crime Control, The Interstate Compact for Supervision of Parolees and Probationers, page 1 (1978 ed.) as follows:

> "The prime purpose of both probation and parole is the protection of the community through the rehabilitation of those convicted of crime (and) the success of both procedures depends on adequate control of those who are released and intelligent supervision while under care."

Thus, the imposition of liability for failure to use reasonable care to provide such adequate control and intelligent supervision will enhance rather than defeat the purposes and policies of the Interstate Compact. The gravamen of the Complaint against the Petitioners is their negligent failure to comply with the mandate of the Compact that the consent of the receiving state be first obtained before transfer is authorized, and after the receiving state has been given an opportunity to conduct an appropriate investigation, and the obtaining of the agreement of the receiving state to provide such supervision and control upon the arrival of the transferred person. Nevada has previously announced its policy that those governmental agencies and instrumentalities charged with the responsibility of providing supervision and control over persons involved in the criminal corrections system will be liable to private citizens who sustain injuries as a result of the negligent performance of such duties of supervision and control (*State v. Silva,* 86 Nev. 911, 478 P.2d 591 (1970)). It is well within the legitimate policy interests of Nevada to provide a similar remedy to its citizens when they suffer similar injuries from negligent supervision and control within the State of Nevada by employees of sister states charged with such duties. The duties of supervision and control had not been transferred to Nevada pursuant to the Interstate Compact insofar as this case is concerned, since Nevada had not consented to such transfer and agreed to assume such duties. Thus Barney Blake was still subject to supervision and control of Wisconsin, and its negligent performance of such duties is the basis of the action herein involved. It is not a mere parochial interest, but is the same type of interest involved in *State of Nevada v. Hall, supra,* wherein

California had waived its immunity from liability for injuries it negligently caused, and was held entitled to apply that policy to injuries negligently caused within its border by a sister state who had not waived such immunity.

In fact, in the case at bar, the conflict of policy between the two states is not nearly so clear-cut. Wisconsin has judicially abolished the substantive defense of sovereign immunity, and thus, even under its own law, would be substantively liable for the claim herein asserted. (*Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962)) However, it has retained the power to deny access to its courts by the withholding of consent to be sued, thereby creating a procedural immunity to liability when its withholds such consent. (*Townsend v. Wisconsin Desert Horse Association et al.*, 72 Wis.2d 414, 167 N.W.2d 425 (1969); *Knox v. Regents of University of Wisconsin*, 395 F.Supp. 886 (E.D.Wis. 1975). Thus the only type of immunity retained as the policy of the State of Wisconsin is a "forum-access" type of immunity; the policy of the State of Wisconsin is that it is not substantively immune from liability for its torts. Whatever may be the right of Wisconsin to deny access to its own courts, or to retain the right to require its consent as a condition to being sued in the federal courts pursuant to the Eleventh Amendment, *State of Nevada v. Hall, supra,* makes it very clear that the Full Faith and Credit Clause does not permit it to extend such procedural power into the courts of sister states. This Court therein stated:

> "This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a

> second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity."

The State of Nevada has declared its will in the decision attached to the Petition as Appendix B that the citizens of this state will have a remedy for injuries they sustain as the result of negligent failure to discharge the duties and responsibilities of supervision and control over persons in actual or constructive custody in the criminal corrections system, regardless of whether the persons guilty of such negligence are employees of the State of Nevada or some other state. Nothing in the Full Faith and Credit Clause requires Nevada to frustrate that policy in favor of Wisconsin's procedural immunity which permits it to deny access to its own courts for a remedy for that type of liability. That procedural immunity does not extend to the Courts of the State of Nevada, and Nevada is not constitutionally required by the Full Faith and Credit Clause to deny its citizens access to its courts to enforce a claim recognized as valid against the sovereign in Nevada.

It is therefore respectfully submitted that the Full Faith and Credit Clause does not require Nevada to subjugate its legitimate policy interest in allowing recovery for damages sustained by private citizens as a result of governmental negligence in the supervision and control of persons in custody to the limited interest of Wisconsin in withholding its consent to be sued as a procedural bar to liability for which substantive immunity has been waived. (*Cf. Allstate Insurance v. Hague,* 449 U.S. 302, 66 L.Ed.2d 521, 101 S.Ct. 633 (1981), footnote 9, p. 322-323.)

CONCLUSION

There being no issues involved in this litigation which require any limitation upon the prior decision of this Court in *State of Nevada v. Hall, supra,* it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Attorneys for Respondents

**Counsel of Record*

(Appendices follow)

Appendix A

In the Supreme Court of the State of Nevada

No. 14180

B. Mianecki, and the State of Wisconsin,
Petitioners,

vs.

Second Judicial District Court of the State of Nevada,
in and for the County of Washoe, and the Honorable
John E. Gabrielli,
Respondent.
Linda A. Averett and Stanley E. Averett, individually;
and Linda C. Averett, as mother and guardian of
Trent Averett, a minor child,
Real Parties in Interest.

[Filed November 9, 1982]

ORDER

Petitioners have moved to file a brief in reply to the points and authorities filed by respondent. Specifically, petitioners request permission to respond to "new cases" which have been cited by respondent. Petitioners have also moved for permission to file affidavits from various administrators of the interstate compact at issue in this case. Respondent opposes both requests.

Cause appearing, we grant the request to file a brief in reply to new cases raised by respondent. The brief shall be filed with the clerk not later than Friday, November 12, 1982.

With respect to the filing of additional affidavits, we note that this proceeding challenges the district court's order denying petitioners' motion to quash, and that affidavits were neither filed with nor considered by the district court in its ruling on the motion. Accordingly, we deny the request to file additional affidavits in support of the petition.

It is so ORDERED.

/s/ Gunderson, C. J.

Appendix B

In the Supreme Court of the State of Nevada

No. 14180

B. Mianecki, and the State of Wisconsin,
Petitioners,
vs.
Second Judicial District Court of the State of Nevada,
in and for the County of Washoe, and
the Honorable John E. Gabrielli,
Respondent.
Linda A. Averett and Stanley E. Averett, individually;
and Linda C. Averett, as mother and guardian of
Trent Averett, a minor child,
Real Parties in Interest.

[Filed December 8, 1982]

ORDER

Cause appearing, we hereby deny petitioners' "Motion for Reconsideration and Request to File Amicus Curiae Brief."

It is so ORDERED.

/s/ Gunderson, C. J.
/s/ Menoukian, J.
/s/ Steffen, J.

cc: Messrs. Woodburn, Wedge, Blakey and Jeppson
Messrs. Petersen & Petersen